LIBRARY
SUPREME COURT. U. S

Office - Supreme Court, U.S.
FILED
MAY 19 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 962

U. S. DAIRIES SALES CORPORATION, PURITY PACK CORPORATION, MILK CONTAINER EQUIPMENT CORPORATION, MAURICE J. BRASILE, AND EUGENE BLUM,

Petitioners,

vs.

THE MOJONNIER DAWSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN F. McCANNA,
640 Washington Blvd.,
Oak Park, Illinois,
Attorney for Respondent.

The Scheffer Press, Inc., ANdover 3-6850

INDEX

PAGE

The Patented Invention Truly Promotes the Progress of Science and the Useful Arts 2

The Petition Presents No Valid Reason for Allowance of the Writ 3

Point I—Inaccuracies in the Petition Sufficient Reason for Denial 4

Point II—Alleged Error is Moot Because Count III Was Remanded on Account of Error in Law 8

Point III—No Error in Holding Respondent's Patent Valid 8

Point IV—The Petition is Speculative and Presents No Question of Gravity and General Importance 9

Point V—Certiorari is Not Granted to Review Evidence, Inferences, or Assumptions 9

Point VI—Certiorari Should Not Be Granted To Review A Non-Final Judgment Remanding the Case to District Court for Determining the Issue 10

Point VII—Petitioner's Argument that the Issues of Count III have been Determined is Fallacious 10

Point VIII—Petitioner has not Sustained the Burden of Showing Error in the Judgment Asked to be Set Aside 11

Point IX—In View of the Injustice to Respondent the Petition Should Be Denied With Double Costs to Respondent 11

Conclusion 12

Appendix*

A. Brasile Group Defendant's Petition for Rehearing in Appeal No. 11784 ..... 1a

B. Answer to Petition for Rehearing 11a

*Certified copy of Appendices A to E, inclusive, filed concurrently herewith.

PAGE

C. Order Denying Petition for Rehearing 15a
D. Mandate of Court of Appeals Issued January 24, 1958 ..... 16a
E. Motion to Withdraw Mandate and for Stay of Mandate Pending Application for Certiorari 19a
F. Answer to Motion to Withdraw Mandate and for Stay of Mandate 22a
G. Order Denying Motion to Withdraw and Stay Mandate 36a

AUTHORITIES CITED.

Cases:

American Construction Co. v. Jacksonville T.K.R. Co., 148 U.S. 372, 384 (1893) 10
Fields v. U. S., 205 U.S. 292 (1907) 9
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 10
Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251 (1916) 9
Higgins v. Carr Bros., 317 U.S. 572 (1943) 11
Hunt v. Armour & Co., 185 F. 2d, 722 (C.A. 7, 1951) 3
Labor Board v. Pittsburgh S. S. Co., 340 U.S. 498 (1951) 10
National Labor Relations Board v. American Insurance Co., 343 U.S. 395 (1952) 9
Schreyer, et al. v. Casco Products Corp., 190 F. 2d, 921 (C.A. 2, 1951) 6
U. S. v. Johnson, 268 U. S. 220 (1925) 10
Weeth v. Mortgage Security Co., 106 U.S. 605 (1882) 10

Statute:

28 U.S.C. 1338(b) .....Pet. 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 962

U. S. DAIRIES SALES CORPORATION, PURITY PACK CORPORATION, MILK CONTAINER EQUIPMENT CORPORATION, MAURICE J. BRASILE, AND EUGENE BLUM,

Petitioners,

vs.

THE MOJONNIER DAWSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is the usual patent suit.

The District Court held the patent invalid for unpatentable aggregation under Count I of the complaint and dismissed Count III which involves inequitable conduct on the part of defendants in aggravation of infringement. The District Court also dismissed defendants' counterclaim of unfair competition.

The District Court did not decide the issue of infringement.

The Court of Appeals reversed the District Court, holding the patent valid as a matter of law. It also reversed the District Court with respect to Count III, holding that the District Court had used an unreliable test. It also reversed the District Court with respect to defendants' counterclaim. It remanded the case to the District Court to determine the issue of infringement and the issues of plaintiff's Count III and defendants' counterclaim.

These rulings are normal to patent litigation.

Respondent submits that the Petition is wholly without merit and for the purpose of delaying the proceedings in the District Court.

The decision of the Court of Appeals, written by Judge Schnackenberg together with Judges Finnegan and Hastings, is well considered and profound.

Petitioner has cited no case or authority warranting certiorari.

The Patented Invention Truly Promotes The Progress of Science and the Useful Arts

The Mojonnier invention of the patent in suit relates to mechanisms for dispensing free-flowing fluids into containers. The invention has been particularly beneficial in the dairy industry and also in the aerosol industry and has revolutionized the practices in both industries.

The filling machine of the Mojonnier invention is especially designed for repetitive production filling in commercial plants where the filling operations require a high degree of accuracy in the quantity dispensed at each filling and where the cost of such filling operations is important.

In the dairy industry the invention is of particular utility for filling milk into wax or paraffin-treated paper cartons.

The invention was a boon to small dairymen because it made available to them for the first time a suitable low-priced filling machine which enabled them to compete with the larger dairy concerns who had large and expensive filling equipment operating on principles quite different from the Mojonnier invention.

In the aerosol industry the invention has been most beneficial for filling chemicals, propellants and products into the so-called aerosol "bombs" for spraying or dispensing insecticides, deodorants, shaving soap, whipping cream and many other products.

The Petition Presents No Valid Reason For Allowance Of The Writ

The Petition presents no question of gravity or general importance, but merely speculative argument concerning matters within the normal reviewing powers of the Court of Appeals.

Questions 1 and 2 deal with ordinary matters of discretion on the part of the District Court and the Court of Appeals; and the argumentative wording of these questions, together with inaccuracies pointed out herein, evidence the strained and futile efforts to present a question worthy of review by this Court.

As to Question 3, the Petition is totally blank. On the contrary, the decision of the Court of Appeals holding valid claims 1, 6 and 7 of the Mojonnier Reissue Patent No. 23,830, is a profound statement of facts and law evidencing thorough consideration of the record and the arguments of the parties. The Court of Appeals left no doubt as to what it thought about the Mojonnier patent, in quoting from its earlier case in *Hunt* v. *Armour & Co.* (Pet. 25), "that the claims of a meritorious patent should have a liberal interpretation."

And, because this Court's rules require that inaccuracies in the Petition be answered, we will discuss *infra* those points which involve serious distortion of the record facts.

POINT I. INACCURACIES IN THE PETITION SUFFICIENT REASON FOR DENIAL.

1. Petitioner's Question 1 is erroneous in the premise that the Court of Appeals *totally disregarded*[1] findings of fact, for reasons:

(a) There is no evidence that any findings were totally disregarded by the Court of Appeals.

(b) The Court of Appeals in its decision discussed Findings of Fact 15, 16, 17 and 19. It did not specifically mention Findings 1 to 14 inclusive and 18. There is no rule calling on the Court of Appeals to discuss each and every finding of fact in reaching its conclusions. To hold otherwise would place a burden on the Court of Appeals far beyond that of an appellate tribunal and would impose on the appellate court the duties of the District Court with respect to making findings of fact and conclusions of law.

2. In Question 2, petitioner incorrectly states that at the trial plaintiff was granted leave to try both Counts I and III concurrently *although the factual situations were not closely related.* Count I alleges, in general terms, infringement of Reissue Patent No. 23,830. Count III *incorporates* Count I (R. 24) and enlarges the allegation of infringement by specifically alleging the contractual and confidential relation of the plaintiff and defendants and the inequitable conduct of defendants in surreptitiously copying plaintiff's machine while under such relationship,

[1] Emphasis is ours unless otherwise stated.

and the step-by-step continuation of this unauthorized appropriation of the Mojonnier invention, all in aggravation of infringement. The evidence dealing with the relationship of the parties and the circumstances under which defendants appropriated the invention is relevant and material to the issue of infringement regardless of the allegations of Count III.

The factual situations in Counts I and III are not merely *closely related* but they constitute one continuous act (plaintiff's brief, Summary of Argument, items 13 and 15; Statement of Facts, pages 21-22; Contested Issues (3) and the following paragraph; Argument Point 5, pages 62 to 69, 70-71; and plaintiff's reply brief,[2] pages 49 to 66).

The District Court properly heard the evidence under Counts I and III because these claims were related. The law provides that the District Court shall have original jurisdiction when a cause of unfair competition is joined with a substantial and related claim under the patent laws (28 U.S.C. 1338 (b) Pet. 11).

3. Petitioner *assumes* (Pet. 2) that the District Court decided Count III as an independent cause of action. The District Court's memorandum (R. 1168) does not specifically mention Count III nor the allegations of Count III. These allegations are far more specific than the mere reference to *unfair competition* in that they deal with a series of connected facts in aggravation of infringement.

4. Petitioner incorrectly states (Pet. 3-4) that the order of the District Court prior to the trial directing that the issues relating to Counts I and III be heard separately and in that sequence was predicated *on the assumption that plaintiff's claim under Count III was dependent on the*

[2]Certified copy filed concurrently herewith.

patent being held valid and infringed. There is no record of any such assumption on the part of the District Court. Even assuming *arguendo* that Count III is for unfair competition, judgment could be awarded to plaintiff even though the patent was held invalid or not infringed. *Schreyer, et al.* v. *Casco Products Corp.*, 190 F. 2nd, 921 (C A 2, 1951).

5. The Petition incorrectly states (Pet. 5) that the only reference to findings 10, 11, 12 and 13 in plaintiff's brief appears at page 24 in the statement of "The Contested Issues" and that these findings are falsely characterized as relating not to Count III but to certain defenses to Count I. Plaintiff contended before the Court of Appeals not only the issue (3) but that the District Court had made erroneous findings Nos. 10, 11, 12, 13, 17, 18 and 19, which were contrary to the law and facts in this case (plaintiff's brief p. 24). Contrary to the Petition, plaintiff's brief relating to allegations of Count III is comprehensive, being the subject matter of plaintiff's brief, Point 5, pages 62 to 69; Summary of Argument, Items 13 and 15; Propositions of Law, Items 14, 15 and 16; and plaintiff's reply brief, pages 49 to 66.

6. The Petition is inaccurate (Pet. 6) in assuming that the Court of Appeals *wholly overlooked or disregarded* the findings in question, merely because the Court of Appeals said "However the Court did not set forth a basis of fact for this conclusion". (This obviously means that the Court of Appeals in considering the record came to the conclusion that the District Court's memorandum opinion, together with its findings of fact did not set forth a basis of fact for its conclusion.) Findings 10, 11, 12 and 13 deal with numerous facts including machine constructions and as such the Court of Appeals was justified in saying the

District Court did not set forth findings on its conclusion with respect to unfair competition. It was not incumbent on the Court of Appeals to say that the findings were *insufficient* or that they were clearly erroneous. It did say that the District Court had used an "unreliable test". This was error of law, justifying the reversal. Therefore, the Court of Appeals properly remanded Count III to be determined by the District Court along with the issue of infringement. The District Court would then make its own findings.

7. Question 2 (b) presents an inaccurate *assumption* with respect to the award of costs against petitioner on appeal. The awarding of costs by the Court of Appeals is discretionary and not subject to review here.

8. The Petition is inaccurate in stating (Pet. 5) that fact findings 10, 11, 12 and 13 related *solely* to issues of fact raised by Count III and in contending that these are acts of unfair competition and not acts of infringement or aggravation of infringement. Since the District Court did not decide the issue of infringement it was not incumbent on the Court of Appeals to make a ruling on this. And, since these findings of a mixed composition involve facts dealing with infringement, it was entirely proper for the Court of Appeals to reverse and remand the District Court's ruling with respect to Count III.

9. Contrary to the Petition (Pet. 4) regarding the length of the trial, it was the numerous defenses alleged by these defendants and the corps of defense lawyers presenting endless technicalities, that accounted for most of the trial.

POINT II. ALLEGED ERROR IS MOOT BECAUSE COUNT III WAS REMANDED ON ACCOUNT OF ERROR IN LAW.

In submitting Questions 1 and 2, petitioner ignores the fact that the Court of Appeals reversed the judgment of February 21, 1956 (R. 1178) insofar as Count III is directed against the Brasile defendants and remanded this to the District Court for the reason that the District Court used an *unreliable test* (Pet. 30), "a thought too ambiguous and general on which to conclude that there was no unfair competition by the Brasile defendants."

This was an error of law on the part of the District Court. It follows that discussion by the Court of Appeals of findings 10, 11, 12 and 13 was moot.

Obviously the Court of Appeals was impressed with the record that an injustice would be done to plaintiff if it allowed the District Court's judgment to stand where the District Court had not applied the proper rule of law.

POINT III. NO ERROR IN HOLDING RESPONDENT'S PATENT VALID.

The fallacy of the Petition is evidenced by submitting Question 3 without one word of any alleged error in the Court of Appeals' decision holding the Mojonnier patent valid.

It is elementary that this Court will not grant certiorari in patent cases in the absence of conflicting decisions in different circuits or some extraordinary reason of general importanee to an industry.

POINT IV. THE PETITION IS SPECULATIVE AND PRESENTS NO QUESTION OF GRAVITY AND GENERAL IMPORTANCE.

Question 1 is not only inaccurate (Point I) but it is moot (Point II).

Question 2 on its face is purely speculative.

Question 3 is without merit (Point III).

Where the Petition presents no question of gravity and general importance there is no reason for review by this Court. *Fields* v. *U.S.*, 205 U.S. 292, 296; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258.

POINT V. CERTIORARI IS NOT GRANTED TO REVIEW EVIDENCE, INFERENCES, OR ASSUMPTIONS.

The Petition is grounded on assumptions and inferences concerning findings of fact relating to Count III which was remanded to the District Court for determination. Review of these findings would make this Court an ordinary court of review involving the hearing of contentions as to disputed facts, sorting of documents to select relevant provisions, ascertaining their ultimate form and meaning, and the reduction of a mass of conflicting contentions as to facts and inference from facts. This is a task primarily for the trial court and not for the Supreme Court.

As was stated by Mr. Justice Vinson, speaking for the Court in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, at page 409-410:

> "Last term we made it plain that Congress charged the Court of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is

not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than another, though fairminded judges could find it tilting either way.' *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951)."

This Court cannot be called upon to consider the weight or effect of evidence in cases of this kind. *Weeth* v. *New England Mortgage Co.*, 106 U.S. 605, 606; *U. S.* v. *Johnson*, 268 U.S. 220, 227; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178.

POINT VI. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A NON-FINAL JUDGMENT REMANDING THE CASE TO DISTRICT COURT FOR DETERMINING THE ISSUE.

This case was properly remanded to the District Court to determine the issue of infringement and the related issue of Count III. The contentious argument that the Court of Appeals erred at this interlocutory stage is without merit.

The same arguments were submitted by Petitioner on motion for rehearing and denied, Appendices A, B and C.

It is not the practice to grant certiorari under such circumstances. *American Construction Co.* v. *Jacksonville, T.K.R. Co.*, 148 U.S. 372, 384.

POINT VII. PETITIONER'S ARGUMENT THAT THE ISSUES OF COUNT III HAVE BEEN DETERMINED IS FALLACIOUS.

The Petition sets forth that plaintiff presented its evidence relating to Counts I and III concurrently and both counts were fully litigated (Pet. 4); yet as a reason urged for granting certiorari the petitioner contends that the decision below imposes on petitioner the burden of reliti-

gating the identical issues and that these issues have already been determined.

The issues of infringement (Count I) and aggravation of infringement (Count III) have not been determined.

Petitioner's position is inconsistent, since by petitioner's own statement no further evidence is needed on the remand of Count III.

In remanding Count III the Court of Appeals noted that at the same time the District Court would also consider the issue of infringement and this would be available in connection with Count III.

Furthermore, respondent is the aggrieved party in these proceedings.

POINT VIII. PETITIONER HAS NOT SUSTAINED THE BURDEN OF SHOWING ERROR IN THE JUDGMENT ASKED TO BE SET ASIDE.

This is the well recognized rule. Petitioner has failed to show error requiring review by this Court. *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572, 574.

POINT IX. IN VIEW OF THE INJUSTICE TO RESPONDENT THE PETITION SHOULD BE DENIED WITH DOUBLE COSTS TO RESPONDENT.

The Petition fails to set forth that these defendants after having been denied a rehearing before the Court of Appeals, filed a motion to withdraw the mandate and for stay of mandate pending application for certiorari, which was denied. These proceedings are shown in Appendices E, F and G. Both in the motion for stay and in the present Petition, there is failure to offer security for the stay of execution of the judgment of the Court of Appeals

under its mandate Appendix D. Yet these defendants are using this Petition as a means of delaying the further hearing of this case by the District Court.

This is an injustice to respondent for reasons:

1. This litigation has been going on for over four years without determination of the issue of infringement. Petitioner continues to manufacture and sell the accused machine through a pattern of successive corporations, as shown in Appendix F. By abandoning most of these prior defendant corporations this petitioner ostensibly makes for confusion and deception as to liability. Furthermore, petitioner is financially irresponsible as shown by the maze of unsatisfied liens and judgments against these defendants listed in Appendix F.

2. Petitioner has not paid the costs against it awarded by the Court of Appeals amounting to some $4,000 (Appendix F, p. 24a) and appears to be judgment-proof as evidenced by the failure to pay Federal income taxes, Federal withholding taxes, and the many judgments listed in Appendix F.

3. The printed record used by petitioner was paid for by respondent, yet petitioner is here using this record without cost to it.

Therefore, double costs should be awarded to respondent under this Court's Rule 57.

CONCLUSION.

The Petition Is Without Merit And Should Be Denied.

Respectfully submitted,

JOHN F. MCCANNA,
Attorney for Respondent.

APPENDIX A.

PETITION OF BRASILE GROUP DEFENDANTS-APPELLEES FOR REHEARING IN APPEAL NO. 11784.

The Brasile group defendants-appellees respectfully petition for a rehearing of Appeal No. 11784 to the extent that such appeal is concerned with review of the decision of the trial court which dismissed for want of equity Count III of plaintiff's Complaint charging these defendants with unfair competition. In support of this petition these defendants respectfully represent that this Court, in reversing the judgment of the trial court and remanding Count III for retrial, erred in the following particulars:

I. In holding that the trial court set forth no basis of fact for its conclusion that the defendants were guilty of no acts of unfair competition. To the contrary, the trial court entered detailed Findings of Fact on Count III which this Court overlooked.

II. In holding that Count III was tried and decided below as a claim wholly dependent on the unresolved issue of infringement. In fact, Count III was tried and decided below as an independent claim for unfair competition; or

III. In holding that if Count III was decided below as an independent cause of action, contrary to plaintiff's theory of the claim, it must therefore be retried; or

IV. In holding that since infringement was not determined below, Count III must be remanded for retrial even if it was formerly tried and decided as a claim dependent on infringement.

V. In awarding to plaintiff costs on this appeal relating to the review of Count III, notwithstanding that this count was tried below, and this appeal thereon was occasioned, solely by reason of plaintiff's insistence at the trial that Count III be tried concurrently with the issues of patent infringement and validity.

ARGUMENT.

This petition does not concern the ruling of this Court upholding the validity of the patent in suit. It is directed entirely to that portion of the Court's decision in Appeal 11784 which relates to Count III of the plaintiff's Complaint and which appears at pages 15 to 16 of the printed Opinion.

I. The Court Overlooked the Findings of Fact of the Trial Judge on Count III.

Count III of the Complaint (R. 24-28) was variously characterized by plaintiff at the trial as stating a claim for "wrongful appropriation of invention" or violation of a confidential relation. (R. 118, 266.) It will be noted that each of the matters complained of in Count III, other than the alleged act of infringement itself, occurred many months and as much as several years before the plaintiff had a patent. After full trial of the issues formed by this Count and the Answers thereto, the trial judge dismissed Count III for want of equity.

Reviewing this part of the proceedings below, this Court reverses the judgment of the trial court dismissing Count III and remands this Count to the District Court "for a retrial." In this connection this Court states that the trial court

> "concluded as a matter of law that the Brasile defendants had not engaged in any act of unfair competition toward plaintiff. However the Court *did not set forth a basis of fact for this conclusion.*" (Emphasis supplied.)

To support this observation this Court refers to a sentence in the Memorandum Opinion of the trial judge (R.

1168) in which the latter said that he did not believe there was any unfair competition on either side.

It would thus appear that this Court's decision touching Count III was predicated on the erroneous assumption that findings of fact on Count III were not made at the conclusion of the trial. To the contrary, the trial judge made detailed and specific findings of fact following the allegations of Count III and which negative each and every material averment therein. (Findings 10 to 14 inclusive; R. 1173-1174.) It is not true, as this Court apparently was led to believe, that the decision of the trial court was based on the above-mentioned comment contained in its Memorandum Opinion. This Memorandum preceded in time the entry of findings of fact and conclusions of law and was, of course, implemented by the entry of such findings and of judgment thereon.

In this case, then, fact findings decisive of the issues were duly made after full trial of Count III. Yet this Court, without considering the findings, and apparently being unaware of their existence, reverses the judgment of the trial court and remands Count III for retrial—despite the fact that neither in its briefs nor in the oral argument did plaintiff even discuss the findings of the trial court.

These defendants, as well as this Court, are entitled to the protection of Rule 52(a) of the Rules of Civil Procedure for the United States District Courts, which requires that findings of fact shall not be set aside unless clearly erroneous. It is submitted that unless this Court shall review these findings and be convinced after such review that they are not supported by any substantial evidence in the record, the judgment of the trial court dismissing Count III for want of equity should be affirmed.

II. The Findings and Judgment of the Trial Court on Count III Were Not Premature.

Perhaps this Court, without being unmindful of the findings on Count III, considered them premature in view of the assumed dependence of Count III on the undetermined issue of infringement, and hence concluded that the judgment based on these findings should be reversed and the cause remanded for retrial,

> "at which time the Court's decision as to infringement should have been made and be available for consideration." (Op., p. 16.)

If such is the proper interpretation of this Court's Opinion, then it is apparent that this Court has misapprehended the scope of the issues tried and the effect of the trial court's decision.

The fact is that the case was not tried or decided below solely on the theory that Count III was dependent upon a finding of infringement. If it was tried on this theory at all, it was also tried and decided on the theory that Count III presented an independent cause of action on which recovery might be had even if defendants should prevail on the issue of validity or the issue of infringement.

It is true that these defendants, and apparently the Court, originally considered Count III as stating a dependent cause of action. On this supposition, some two months before the trial of the case, these defendants asked for and the court entered an order directing that the issues relating respectively to Counts I and III be heard separately and in that sequence. (R. 59; Finding 8, R. 1172.) Had this manner of procedure been followed, either Count III would not have been heard on the first trial of the case, or it would have been tried (as this Court appears

to think it should be) in consequence of a prior finding of infringement. But this manner of procedure was not followed. Throughout the first four days of trial the plaintiff repeatedly ignored this order and persistently argued that it could not proceed with its proofs in the manner required thereby. (R. 86, 113-114, 117-119, 263-269.) Finally, on the fourth day of trial, at the insistence of plaintiff, the Court ruled that this manner of procedure need not be adhered to. (R. 266; Finding 8, R. 1172.) From this time forward plaintiff's evidence relating to Counts I and III was presented simultaneously and, as the Court further found in Finding 19 (R. 1176), the resultant trial of the case consumed approximately sixteen trial days.

It should be noted that at R. 118, to justify its departure from the pre-trial order of procedure, plaintiff relied on *Schreyer, et al.* v. *Casco Products Corp.,* 190 F. (2d) 921 (2d Cir., 1951) and *Colgate-Palmolive Company, et al.* v. *Carter Products, Inc., et al.,* 230 F. (2d) 858 (4th Cir., 1956). In both of these cases claims of unfair competition were joined with claims of patent infringement, and recovery for unfair competition was allowed independently of decision on the issues of patent validity and infringement. And yet in the very same comment of plaintiff in which these cases were cited, plaintiff made the confusing assertions that Counts I and III "are all one and the same thing", namely "infringement and wrongful appropriation of the invention."

This Court perceived the dual nature of Count III, as presenting a claim which could be viewed either as dependent in a finding of infringement or as independent thereof, when it asserted at page 15 of its Opinion that:

> "By Count III plaintiff charged the Brasile defendants with certain alleged acts of infringement *and unfair competition,* asserting that the infringement was aggravated." (Emphasis supplied.)

It is only reasonable to assume that the trial court likewise perceived the dual nature of Count III. Such, indeed, is the only reasonable inference to be drawn from the fact that the allegations of unfair competition were set forth in a separate count. Surely it would be unreasonable to assume that the learned Judge who presided at the trial, while expressly not deciding the issue of infringement, nevertheless proceeded to dispose of a claim which he viewed as wholly dependent on the infringement question. Moreover, there is nothing in the Memorandum Opinion or the Findings of Fact or the Conclusions of Law or the Judgment Order entered by the trial judge which would indicate that he viewed Count III as presenting a dependent claim. To the contrary, the Conclusions of Law entered by the trial judge speak of "unfair competition" in the broadest sense (R. 1177).

While it is true, as this Court observes, that Finding 19 refers to the "dependence of Count III on Count I" (R. 1176), we submit that this reference was intended as a characterization of the motion made by these defendants and of the pre-trial order of procedure entered thereon as aforesaid, rather than as a statement of the theory on which the court below decided the case. In this connection it is significant that in plaintiff's statement of points on appeal (R. 1191, Pt. 29), plaintiff assigned error on the failure of the lower court

> "to recognize the fact that count III of the complaint incorporates count I and is essentially a charge of patent infringement * * * in aggravation of the infringement and not as a separate cause of unfair competition."

The short of it is that Count II was fully tried at the insistence of plaintiff and over the objection of these de-

fendants. After such trial, fact findings were duly made which found all of the issues raised by the pleadings against the plaintiff. Viewing the claim as one independent of a finding of infringement, the trial judge entered judgment of dismissal. Under these circumstances it cannot be said that the findings or the judgment were premature.

III. The Judgment of the Court Below Should Not Be Reversed Merely Because, in Deciding the Matter as an Independent Claim, the Trial Judge Misapprehended Plaintiff's Theory, If Such Was the Fact.

Even if the trial judge misapprehended plaintiff's theory, even if plaintiff merely intended (as it would now have this Court believe) to try under Count III a claim wholly dependent on a finding of infringement, there is still no warrant for overturning the findings of fact and the judgment of the court below on Count III. For whether the claim be viewed as a mere aggravation of infringement or as a separate cause of action, in either case the operative facts alleged are identical, and these facts after full trial have been found against the plaintiff. None of the evidence offered by plaintiff at the trial was excluded; all of the evidence offered by plaintiff, as the findings show, was duly considered. The critical issues of fact were tried without any error which would have required a different result had Count III been tried solely as a dependent claim. No other or different evidence would have been or could have been produced by plaintiff. Plaintiff had its day in court on Count III, at its own insistence, and it is inconceivable that any prejudice resulted to plaintiff regardless of which of the two theories was entertained by the trial judge.

IV. The Judgment of the Trial Court Dismissing Count III Should Not Be Reversed Merely Because Count III Was Decided as a Dependent Claim, If Such Was the Fact.

On the other hand, even if it can be said that the trial judge decided Count III solely as a dependent claim, it does not follow that this decision of the trial court should be reversed and Count III remanded for retrial. It would manifestly be unfair and unjust to these defendants to put them to the expense of relitigating on the same theory the identical issues of fact and law which have already been thoroughly tried and determined at the sole insistence of plaintiff.

Should this Court incline to the view that, since the issue of infringement must be retried and determined, plaintiff should not be precluded at this retrial from showing by way of "aggravation of infringement" any acts or circumstances not precluded by the Findings of Fact made at the first trial, then we respectfully submit that the Opinion and Mandate of this Court should be revised to make it clear that the findings of the trial court on Count III remain undisturbed, and that the issues of fact resolved by those findings are not open to relitigation.

V. In No Event Should Costs on This Appeal Attributable to Review of Proceedings on Count III Be Taxed Against These Defendants.

In any and all events, these defendants respectfully submit that it is obviously unjust that 90% of the costs in this Court allocable to plaintiff's appeal in cause 11784 should be taxed, as this Court directs, against these defendants. The effect of this direction is that these defendants bear 90% of the costs of this appeal including the costs involved in the review of the trial court's de-

cision on Count III. But in no event can these latter costs be regarded as incurred at the instance of these defendants. Clearly this is so if this Court affirms, as we submit it should, the judgment of the court below. It is no less true if this Court adheres to its ruling that Count III must be retried. For, as indicated by the trial court in Findings 8 and 19 (R. 1172, 1176), the first trial of Count III, and the appeal relating thereto, would never have occurred had plaintiff not insisted upon abandonment of the pre-trial order of procedure requiring Counts I and III to be tried separately and in that sequence.

CONCLUSION.

WHEREFORE, the Brasile defendants pray that a rehearing of this cause be granted and that upon such rehearing the Court may:

First: Enter judgment affirming the judgment of the District Court appealed from by plaintiff in Appeal No. 11784 in so far as said judgment dismisses for want of equity Count III of the plaintiff's Second Amended Complaint.

As an alternative, these defendants pray that the Opinion and Mandate of this Court be modified so as to make clear that Findings 10 to 14 of the District Court are not set aside and shall be conclusive on the retrial of all matters of fact therein determined.

Second: Modify the award of costs in this Court in Appeal 11784 so that these defendants shall not be required to bear such costs to the extent the same are attributable

to the review of the District Court's judgment on said Count III.

Respectfully submitted,

HOWARD W. CLEMENT,
RICHARD E. VOLAND,
Counsel for Brasile Defendants-Appellees.

CERTIFICATE.

I, Richard E. Voland, DO HEREBY CERTIFY that in my opinion the foregoing Petition is well taken in law and in fact, that it is filed in good faith and should be granted.

RICHARD E. VOLAND.

APPENDIX B.

ANSWER TO PETITION FOR REHEARING. APPEAL NO. 11784.

Plaintiff respectfully submits that the petition for rehearing is not well-founded and should be denied.

It appears that the petition misconstrues this Court's decision with respect to Count III and on such basis attempts to obtain a reapportionment of the costs of this appeal.

The particulars enumerated in the petition are answered as follows:

I.

This Court recognized the context of Count III which clearly sets forth that it incorporates the allegations of Count I (R. 24) and charges acts of infringement and unfair competition, asserting that the infringement was aggravated (this Court's decision p. 15); also, finding 19 showing the dependence of Count III on Count I as to infringement and validity.

The trial court concluded as a matter of law that the Brasile defendants had not engaged in any act of unfair competition toward plaintiff (R. 1177); but the only statement of the trial court with respect to this is that quoted by this Court and found to be an unreliable test.

The petition contends that this Court was apparently unaware of the existence of findings 10 to 14 when it reversed the trial court's judgment with respect to Count III. The petition overlooks the fact that this Court's decision found that the trial court did not set forth a basis of fact for its conclusion on *unfair competition.*

Count III as found by this Court deals with acts of infringement and aggravation of infringement. Plaintiff on appeal raised the issue "* * * inequitable conduct on the part of defendants in aggravation of infringement as pleaded in Count III." This Court remanded the issue of infringement and this would carry with it the acts relevant to infringement and in aggravation thereof; the unfair competition phase is remanded for retrial.

Contrary to petitioner's contention at page 4, plaintiff did discuss findings 10 to 13. Plaintiff contended that these were contrary to the law and the facts in this case and the trial court was in error in making these findings (plaintiff's main brief, page 24, the contested issues). Plaintiff also contended the trial court was in error in holding it was unnecessary to consider infringement and at the same time to enter findings 10 to 13 (drafted by defendant's attorney) which obviously deal with acts of infringement and aggravation of infringement.

Plaintiff's main brief shows the error of findings 10 to 13. See paragraph 13 of plaintiff's Summary of Argument. The documents and testimony enumerated at pages 21-22 show proof clearly contrary to findings 10 to 13. This is supported by argument on the error, at pages 62 and 71 of plaintiff's brief. Defendant's brief in rebuttal argues mainly on "confidential relationship" (defendant's main brief, pages 47 to 51). This is merely one facet of plaintiff's pleading and proof. It does not overcome the probative value of the many documentary exhibits and uncontradicted testimony pointed out at pages 21 to 22 and 62 to 71 of plaintiff's main brief.

From this Court's decision it appears that it considered findings 10 to 13 are related to the issue of infringement and aggravation of infringement. Since this issue is re-

manded, these findings are in effect a nullity because this issue must be considered on its merits by the District Court and new findings must be made by such court.

This Court's decision also indicates that in view of the unreliable test used by the trial court in reference to unfair competition, it duly considered findings 10 to 13 and found that the failed to state facts sufficiently definite for a clear understanding of the basis of the trial court's decision. In reversing this decision it was unnecessary for this Court to refer to these findings; the findings are automatically either reversed or nullified.

II.

It does not appear pertinent whether findings 10 to 14 were premature, or on what theory Count III was tried. The fact is that this Court has remanded to the District Court the issue of infringement and retrial of the issue of unfair competition "at which time the court's decision as to infringement should have been made and be available for consideration of the court".

Findings 10 to 13 (finding 14 does not appear to be material) are, therefore, a nullity so far as concerns the District Court because the issues of infringement and unfair competition are back for such court to decide.

III and IV.

These are purely speculative and irrelevant. Findings 10 to 13 are either reversed or they are a nullity under this Court's decision.

V.

It appears that petitioner's main effort is to obtain a reapportionment of the costs on this appeal. In support of this, defendants question findings 10-13 and speculate

as to what might be gained in the way of costs if they do not have to face retrial.

Petitioners ignore the fact that both Counts I and III deal essentially with one subject—defendant's alleged infringement of plaintiff's patent.

Plaintiff did not plead "unfair competition" as a separate count or cause of action. The trial of Counts I and III was proper and avoided piece-meal trials of a common subject matter.

There appears to be no valid reason for modifying the costs on appeal.

CONCLUSION.

For the foregoing reasons and for others within the contemplation of this Court in its consideration of this appeal, it is respectfully submitted that no ground for rehearing has been shown and that the petition should accordingly be denied.

Respectfully submitted,

JOHN F. MCCANNA,
Attorney for plaintiff-appellant.

APPENDIX C.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, February 13, 1958

Before

Hon. Philip J. Finnegan, Circuit

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. John S. Hastings, Circuit Judge

THE MOJONNIER DAWSON CO., Plaintiff-Appellant, vs. U. S. DAIRIES SALES CORPORATION, et al., Defendants-Appellees. No. 11784	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for rehearing filed by the Brasile group of defendants in the above entitled cause be, and the same is hereby, DENIED.

APPENDIX D.

MANDATE ISSUED FEBRUARY 24, 1958.

(Filed Feb 25 1958)

United States of America, ss:

The President of The United States of America

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division

Greeting:

Whereas, lately in the United States District Court for the Northern District of Illinois, Eastern Division before you, or some of you in a cause between The Mojonnier Dawson Company, Plaintiff, and U.S. Dairies Sales Corporation, et al., Defendants, Number 54-C-277, a Judgment was entered on the twenty-first day of February, 1956.

as by the inspection of the transcript of the record of the said District Court which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by Mojonnier Dawson Co. agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the term of October, in the year of our Lord one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from by The Mojonnier Dawson

Company, an Illinois corporation, in Appeal No. 11784, be affirmed in part and reversed in part and remanded to the said District Court with directions in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from by U.S. Dairies Sales Corporation, et al., in Appeal No. 11785, be reversed and remanded with directions in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from by U.S. Filler Equipment, Inc., et al., in Appeal No. 11786, be affirmed.

It is further ordered and adjudged by this Court that for the purpose of taxing costs in this Court, the Clerk shall ascertain his fees and the printing charges for the preparation of the printed record covering appeals 11784, 11785 and 11786, as well as the cost of copies of documentary exhibits, under Rule 14(a) and (k) effective Oct. 1, 1954, if any satisfactory showing thereof is made, and shall thereupon apportion 85% thereof to 11784, 13% to 11785, and 2% to 11786. The Court directs that all taxable costs in 11784 shall be apportioned 9/10 thereof against the Brasile Defendants and 1/10 thereof against Plaintiff; that all taxable costs in 11785 shall be apportioned ½ thereof against the Brasile Defendants and ½ against the Plaintiff; and all taxable costs in 11786 shall be taxed against the Lewis Defendants.

Wednesday, January 15, 1958.

And afterwards, to wit: On the thirtieth day of January, 1958, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition was denied on the thirteenth day of February, 1958.

and further that the Appellant, The Mojonnier Dawson Company recover against the U.S. Dairies Sales Corporation, et al. (Brasile Group) the sum of Three Thousand Eight Hundred twenty-three and 03/100 Dollars ($3,-823.03) for their cost herein expended with direction to award execution thereof.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said judgment notwithstanding. Witness, the Honorable Earl Warren, Chief Justice of the United States, the 24th day of February, in the year of our Lord one thousand nine hundred and fifty-eight

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit

By: /s/ R. Hays Blanchard
Chief Deputy Clerk

APPENDIX E.

MOTION TO WITHDRAW MANDATE AND FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI.

(Filed Mar 24 1958)

Now come U.S. Dairies Corp., a corporation, Purity Pack Corp., a corporation, Milk Container Equipment Corp., a corporation, Maurice J. Brasile and Eugene Blum, defendants-appellees (known as the Brasile group defendants) in the above-entitled cause, by their attorney, Richard E. Voland, and move this Court for entry of an order withdrawing the mandate heretofore forwarded to the Clerk of the United States District Court for the Northern District of Illinois on February 24, 1958, and for entry of an order staying the issuance of the Court's mandate herein, pending application of defendants-appellees of the Brasile group to the Supreme Court of the United States for Writ of Certiorari and in support thereof allege:

1. That the opinion of this Court in Appeal 11784 affirming in part and reversing in part the judgment of the court below was filed on January 15, 1958.

2. That this Court entered an order denying the petition for rehearing of the defendants-appellees of the Brasile group on February 13, 1958.

3. That the time permitted these petitioners by law, to-wit: ninety days, for the filing of an application for a Writ of Certiorari to the Supreme Court of the United States has not yet expired, nor has the thirty days during

which this Court will stay a mandate pursuant to its Rule 28(b) expired.

Wherefore, U. S. Dairies Sales Corp., a corporation, Purity Pack Corp., a corporation, Milk Container Equipment Corp., a corporation, Maurice J. Brasile and Eugene Blum, move for entry of an order withdrawing the mandate heretofore issued and forwarded to the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division and for entry of an order staying issuance of its mandate as permitted by law.

U. S. Dairies Sales Corp.,
Purity Pack Corp.,
Milk Container Equipment Corp.,
Maurice J. Brasile
Eugene Blum,
Defendants-Appellees (known as the Brasile group defendants)
By /s/ Richard E. Voland
Their Attorney

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Richard E. Voland, being first duly sworn on oath, deposes and says that he is a partner of the firm of Defrees, Fiske, O'Brien, Thomson & Simmons, 105 South La Salle Street, Chicago 3, Illinois; that he is one of the attorneys for Defendants-Appellees of the Brasile group; that he has read the foregoing motion; that he verily believes it to be true in substance and in fact; that this motion is not made for the purpose of delay; that it is the intention of the Defendants-Appellees of the Brasile group to file a timely application for Writ of Certioriari to the Supreme Court of the United States.

Further affiant sayeth not.

/s/ Richard E. Voland
Richard E. Voland

Subscribed and sworn to
before me this 24th day
of March, 1958.
/s/ Edith Johnson
Notary Public.
(Seal)

APPENDIX F.

ANSWER TO MOTION TO WITHDRAW MANDATE AND FOR STAY OF MANDATE.

(Filed Mar 28 1958)

To the Honorable Judges of Said Court:

Now comes The Mojonnier Dawson Company, plaintiff-appellant in Appeal No. 11784 and plaintiff-appellee in Appeal No. 11785, and opposes the motion of the Brasile group defendants to withdraw the mandate and for stay of mandate.

The motion should be denied for reasons as follows:

1. The motion fails to show any good cause why the mandate in Appeal No. 11784 should be withdrawn or stayed; on the contrary, the reasons set forth in this answer together with the supporting affidavit show good cause why the motion should be denied.

2. The motion fails to set forth any question or issue for review by the Supreme Court.

3. The motion fails to provide security to cover the amounts of the money judgments as well as all damages and costs which plaintiff may sustain by reason of any stay, as provided in Title 28 U. S. Code, Section 2101 (f).

4. The motion fails to tender a supersedeas bond with surety conditioned for the satisfaction of the money judgment in full together with costs, interest and damages for delay, as provided for in Rule 18 of the Revised Rules of the Supreme Court of the United States and also in Rules 62 (d) and 73 (d) of the Federal Rules of Civil Procedure.

5. The granting of any stay without full and satisfactory security would be most unfair to Mojonnier Dawson because

(a) The proposed petition for writ of certiorari most likely would contemplate using the printed transcript of record in the present case which was paid for by plaintiff and for which plaintiff is entitled to recovery under the mandate; and

(b) In the District Court plaintiff was required to file a substantial supersedeas appeal bond with security for costs, interest and damage, in the amount of $7,100.00 (R. 1205-1206).

6. Any supersedeas bond contemplated by 28 U.S.C., Section 2101 (f) and the Rules above mentioned, should provide full security for the money judgments in Appeal No. 11784 amounting to $3,823.03 and in Appeal No. 11785 amounting to $324.83, a total of $4,147.86, together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed.

7. The said money judgments amounting to $4,147.86 to be recovered by plaintiff from the Brasile group defendants have not been paid, although request was made for such payment in letter dated February 27, 1958 by John F. McCanna, attorney for plaintiff, to Richard E. Voland, attorney for Brasile group defendants.

8. The motion is a mere sham for the purpose of delaying determination of the infringement issue in the District Court. This will delay the granting of injunctive relief to restrain infringement and will permit defendants Maurice J. Brasile and Purity Pack Corporation to continue selling the accused filling machine now being manu-

factured by a new corporation Liquid Package Equipment Co. in privity with said defendants.

9. Plaintiff submits that the motion is in bad faith in that it follows a pattern of delays and deliberate attempt to evade and avoid liabilities by the Brasile group defendants as evidenced by

(a) The many unsatisfied judgments of record against these defendants, including Federal and State judgments for failure to pay income and withholding taxes and for other unsatisfied judgments shown in a supporting affidavit attached hereto; and

(b) The practice of forming new corporations to carry out the alleged infringing acts, and the abandonment of preceding corporations.

10. This pattern of conduct of the Brasile group defendants makes them virtually judgment-proof and reflects the bad faith of such defendants in asking for a stay of the mandate without providing full security.

11. Under the exceptional circumstances the motion should be denied or satisfactory security for any stay should be at least double the amount of the judgment sums in Appeals Nos. 11784 and 11785 above stated.

12. Plaintiff respectfully submits that any stay of the mandate should be limited to payment of the money judgments only and conditional upon full and satisfactory security; and any such order should expressly except from the stay, the remand to the District Court for trial of the infringement issue regardless of any proceedings before the Supreme Court.

COMMENT.

Whether or not a stay of proceedings should be granted pending application for certiorari, is a matter within the discretion of the Court. *Fidelity & Deposit Co. of Maryland* v. *Davis* (C.A. 4, 1942) 127 F. 2nd, 780, and cases cited.

Defendant's petition for rehearing (page 3) did not challenge the ruling of this Court upholding the validity of the Mojonnier Reissue Patent; therefore, plaintiff submits that this is an admission to the effect that there was no error in this holding and validity is not subject to review.

Defendant's supporting affidavit states that the motion is not made for the purpose of delay. Inasmuch as the motion states no question for submission to the Supreme Court, and inasmuch as the reversal was primarily with respect to the issue of validity, there is no reason for withdrawing or staying the mandates in Appeals Nos. 11784 and 11785, particularly with respect to the money judgments. Should this Court deem it proper to stay the mandates pending the timely filing of an application for a writ of certiorari to the Supreme Court of the United States, then such stay should be conditioned upon the full and satisfactory security to be furnished by defendants.

Further commenting on reasons why plaintiff challenges defendant's statement that this motion is not made for the purpose of delay, the following is noted:

For some four years since the complaint was filed February 19, 1954, the Brasile group defendants have continued to make and sell the accused filling machine PX-40 which plaintiff alleges infringes the Mojonnier Reissue Patent 23,830. This conduct is apparently with immunity and disregard of patent rights. The formation of one company after another (seven companies during a period of

some five years) reflects the conduct of defendant Maurice J. Brasile in making and selling the accused filling machine. These acts, we say, together with the record of unsatisfied liens for unpaid Federal income taxes, withholding taxes, State taxes, etc., and the many judgments listed in the supporting affidavit, show a pattern the purpose of which is avoidance of liabilities and immunity from judgments.

The instant motion is another step in this long chain of events—obviously intended to delay the determination of the issue of infringement and to give a cast of righteousness to the making of the "Seal-O-Matic" filler shown in the supporting affidavit, Exhibit A, and selling it at a cut price far below the selling price of plaintiff's comparable filler.

The unsatisfied judgments and new corporations in place of the old, show this pattern.

These are deliberate and wanton acts which ostensibly set up legal barriers against recoveries for liabilities.

The present motion is typical.

In view of the financial irresponsibility of the Brasile group defendants the time delay incident to a Supreme Court action would work irreparable damage to plaintiff.

Respectfully submitted,

The Mojonnier Dawson Company
By /s/ John F. McCanna
John F. McCanna
Attorney for Plaintiff

PROOF OF SERVICE

The undersigned hereby certifies that on the 28th day of March, 1958 he served a true copy of the above and foregoing Answer on Richard E. Voland, attorney for defendants-appellees of the Brasile group, and on Louis Bernat, attorney for defendants-appellees of the Lewis group, by mailing such copy to said Richard E. Voland, enclosed in a sealed envelope, postage prepaid, addressed to him at 105 S. LaSalle St., Chicago, Illinois, and by mailing such copy to said Louis Bernat, enclosed in a sealed envelope, postage prepaid, addressed to him at 135 S. LaSalle St., Chicago, Illinois.

/s/ John F. McCanna

State of Illinois }
County of Cook } ss.

AFFIDAVIT

John F. McCanna, being first duly sworn on oath, deposes and says:

That he is attorney for The Mojonnier Dawson Company, plaintiff herein;

That he has caused to be investigated the records in the McHenry County Courthouse at Woodstock, Illinois with respect to tax liens and judgments not satisfied against the Brasile group defendants and found entries of certain such tax liens and judgments substantially as follows:

Tax Liens Not Satisfied As Of Record McHenry County Courthouse, Woodstock, Illinois, as of February 28, 1958

Maurice J. Brasile

Federal income tax lien, Volume 2, page 166—September 27, 1957, Maurice J. and Pauline Brasile	$7,772.29

Federal tax lien, Volume 2, page 224—

February 20, 1958, withholding tax 100% penalty, Maurice J. Brasile / or Eugene Blum 5,196.89

U. S. Dairies Sales Corp.

Federal tax lien, withholding tax, Volume 2, page 17, July 5, 1955 $2,056.70

State of Illinois tax lien, book "Unemployment Compensation Contribution Tax Lien Index", page 280, November 4, 1955 449.32

Federal withholding tax lien, Volume 2, page 67, August 1, 1956 1,335.76

Federal withholding tax lien, Volume 2, page 165, Sept. 24, 1957 1,023.38

Milk Container Equipment Corp.

Federal withholding tax lien, Volume 2, page 18, July 5, 1955 $2,445.15

State of Illinois tax lien, book "Unemployment Compensation Contribution Tax Lien Index", page 164, August 30, 1955 149.17

State of Illinois tax lien, book "Unemployment Compensation Contribution Tax Lien Index", page 164, November 4, 1955 132.98

Federal withholding tax lien, Volume 2, page 66, August 1, 1956 1,728.66;

Judgments Not Satisfied As Of Record McHenry County Courthouse, Woodstock, Illinois As Of February 28, 1958

Maurice J. Brasile

Docket 16, page 12, Arthur T. Becker v. Maurice J. Brasile and Pauline Brasile, judgment February 14, 1958 $ 128.64

Docket 16, page 224, Jack Richardson v. Maurice J. Brasile, judgment September 21, 1956 969.75

Docket 15, page 233, Raymond Schneider v. Maurice J. Brasile, judgment May 28, 1956	3,923.31
Docket 15 page 301, James Ladefoged and Florence Ladefoged v. Maurice J. Brasile and Pauline Brasile, judgment August 30, 1957	323.17
Docket 15, page 301, H. Garrett v. Maurice J. Brasile, judgment August 30, 1957	5,329.62
Docket 15, page 301, John A. Polivka v. Maurice J. Brasile, judgment August 30, 1957	5,806.56

U. S. Dairies Sales Corp.

Docket 15, page 310, Department of Labor v. U. S. Dairies Sales Corp., judgment October 25, 1957	$ 482.99
Docket 15, page 207, Crouch Dain Supply Co., Inc. v. U.S. Dairies Sales Corp., judgment October 31, 1955	2,155.48
Docket 15, page 210, Sewell-Simpson Dairy Supply Co. v. U. S. Dairies Sales Corp., judgment November 15, 1955 (Amount due	1,835.19

Milk Container Equipment Corp.

Docket 15, page 311, Department of Labor v. Milk Container Equipment Corp., judgment October 25, 1957	$ 118.75;

Failure To Pay Illinois Corporation Franchise Taxes

That defendants U. S. Dairies Sales Corp. and Milk Container Equipment Corp. are not in good standing on the records of Secretary of State of Illinois and were certified to the Attorney General for dissolution November 15, 1956 for failure to file annual report and pay franchise taxes for 1956, as reported in a letter dated February 28, 1958 by the Secretary of State, Illinois, to deponent;

Attorney's Lien For Costs, Disbursements And Fees

As of September 19, 1955, the date of the argument before the trial judge, defendants were indebted to their attorneys for "Costs, disbursements and fees—in the amount of $45,000.00" in connection with this case, evidenced by a "Notice of Attorney's Lien" served on deponent and signed by Richard E. Voland and Howard W. Clement— $45,000.00;

That in addition to the foregoing there are the unsatisfied judgments under the mandates of this Court issued February 24, 1958, as follows:

> Judgments for recovery by The Mojonnier Dawson Company against U. S. Dairies Sales Corporation, et al., (Brasile group defendants),
>
> Appeal No. 11784 $3,823.03
> Appeal No. 11785 324.83
>
> $4,147.86;

Seven Companies Caused To Be Formed By Defendant Brasile For Selling The Mojonnier Filler Under Contract And Subsequently Making And Selling The Accused Filling Machine

---

That at least seven corporations have been formed or caused to be formed by defendant Maurice J. Brasile, for the purpose of either selling the Mojonnier "Electromatic" filler under contract with plaintiff (PX-58) or making and/or selling a filler identified in this action as the accused filling machine PX-40 and DX-33. The first six said corporations are as follows:

	Incorporated
(1) Preformed Carton Corporation	Jan. 23, 1952 PX 87 (R. 259-260) (R. 442)
(2) U. S. Filler Equipment, Inc.	Sept. 22, 1952 PX 88 (R. 444)
(3) U. S. Carton Forming Corporation	Nov. 8, 1952 PX 89 (R. 455)
(4) Purity Pack Corporation	Sept. 2, 1953 PX 90 (R. 455-456)
(5) Milk Container Equipment Corp.	Sept. 2, 1953 PX 91 (R. 456-457)
(6) U.S. Dairies Sales Corporation	Dec. 18, 1953 PX 92 (R. 457-458)

(All located at Woodstock, Illinois at time of complaint allegations).

(7) Liquid Package Equipment Co., Delaware Corporation (located at Woodstock, Illinois); Oct. 1, 1957

That is corporation (7) was caused to be recently formed by defendant Brasile for making a filler mechanism identical with that in the accused filling machine PX-40;

That corporations (1), (2) and (3) sold and distributed the Mojonnier "Electromatic" filler for Pure Pak cartons exclusively under the contract with plaintiff of December 29, 1951 (PX-58);

That defendant corporation (5) was used to manufacture the accused filling machine PX-40;

That defendant corporations (4) and (6) were used to sell and distribute the accused filling machine PX-40 as shown in the record;

That defendant corporations (5) and (6) are no longer used by said Maurice J. Brasile and are not in good standing in the records of the Secretary of State, Illinois, as shown above, but instead said Brasile has caused to be formed and is in privity with corporation (7) for the purpose of manufacturing a filling machine known as the "Seal-O-Matic", in which the filling mechanism is identical with that of the accused filling machine PX-40;

That said "Seal-O-Matic" filler is sold and distributed to the trade by defendant corporation (4), Purity Pack Corporation;

That deponent's investigation of these companies reveals that said Maurice J. Brasile is the principal and alter ego and he instigated the design and construction of the "Seal-O-Matic" filler and controls the manufacture and sale thereof;

That corporation (7) Liquid Package Equipment Co. does not maintain a manufacturing plant but has a place for assembling parts into a complete filling machine (said "Seal-O-Matic") which parts are purchased from outside manufacturers;

That the "Seal-O-Matic" filler made by said corporation (7), Liquid Package Equipment Co., and sold by defendant corporation (4), Purity Pack Corporation, is shown in a sales circular put out by said Purity Pack Corporation, which circular is attached hereto marked Exhibit "A";

That the construction and operation of the filling mechanism of this "Seal-O-Matic" filler is identical with that of the accused filling machine PX-40;

That Exhibit "A" shows the selling price of this "Seal-O-Matic" fully automatic filler, complete, for $3,395 f.o.b. Woodstock, Illinois, whereas the comparable fully automatic "Electromatic" filler put out by The Mojonnier Dawson Company has a selling price of $6,040 f.o.b. Franklin Park, Illinois.

/s/ John F. McCanna
John F. McCanna

Subscribed and sworn
to before me this
27th day of March, 1958
/s/ Jule M. Osborn
Notary Public
My Commission Expires
February 4, 1962
(Seal)

EXHIBIT "A"

NEW!
SEAL-O-MATIC
FULLY AUTOMATIC
FILLER
by the ORIGINATOR who was first to make available to the small, medium size dairies, preformed straight wall Pure-Pak cartons.
Guaranteed Leakproof
the Greatest Advance
in Milk Packaging
• FOAMLESS FILLING WITHOUT DEFOAMER
• JAMLESS HYDRAULIC SINGLE STAPLING
• AUTOMATIC DATER AND CODE DATER
• LESS WASH-UP TIME
• DOUBLE PROTECTION AGAINST CONTAMINATION
NEW
GALLON PACK*
the volume sales maker
* Covered by Pending Patent Application

LIBERAL TRADE-IN ALLOWANCE

on your present FILLER SEALER

The SEAL-O-MATIC FILLER sells complete $3395.00 FOB

WRITE
WIRE
PHONE

PURITY PACK CORP.

P. O. BOX 430

Woodstock, Illinois Woodstock 131

Our trained technicians customize the ***SEAL-O-MATIC FILLER*** to fit the processing capacity of your plant without costly revisions of present plant layout.

Newly Converting?

We have preformed cartons conveniently and promptly available. Stock or individually designed cartons can be ordered through our salesman.

APPENDIX G.

ORDER DENYING STAY OF MANDATE.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO 10, ILLINOIS

Friday, April 11, 1958

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. John S. Hastings, Circuit Judge

THE MOJONNIER DAWSON CO., *Plaintiff-Appellant,*
vs.
U. S. DAIRIES SALES CORPORATION, et al., *Defendants-Appellees.*

No. 11784

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of counsel for defendants-appellees (Brasile group defendants) to withdraw mandate heretofore issued to the United States District Court, and for stay of mandate pending application for certiorari; and the answer to said motion by counsel for plaintiff-appellant,

It Is Ordered that the said motion of counsel for defendants-appellees (Brasile group defendants) be, and the same is hereby, denied.